Supreme Court, U.S.
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No. ——

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IN THE
Supreme Court of the United States

XOMOX CORPORATION, EMERSON ELECTRIC COMPANY,
Petitioners,

v.

FEDERAL INSURANCE COMPANY,
as subrogee of CHARLES LOWE COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals' error in reversing a summary judgment (granted to Petitioner Xomox by the District Court solely with respect to Respondent Lowe's breach of contract claim of failure to reimburse) by inexplicably ignoring the deliberate waiver and abandonment by Respondent Lowe of its two other breach of contract claims (failure to defend and failure to timely re-tender) that were never presented to, or considered by, the District Court, and which were deliberately waived, but were raised for the first time on appeal, then reviewed and utilized by the Ninth Circuit as the basis for reversal of the summary judgment, all without consideration of the effect of the deliberate waiver, so far departs from the accepted and usual course of judicial proceedings as to merit review by this Court, in light of the failure of Ninth Circuit and three other circuit courts of appeals to observe and incorporate into their civil jurisprudence the fundamental and categorical distinction between waiver and forfeiture announced in *United States v. Olano,* 507 U.S. 725 (1993)?

STATEMENT OF PARTIES

The parties to this proceeding whose judgment is sought to be reviewed are Petitioners Emerson Electric Company and its wholly owned subsidiary Xomox Corporation. There are no publicly held companies which own 10% or more of Emerson Electric Company's stock.

Respondent Charles Lowe Company's corporate status was suspended by the State of California on March 17, 1997. Accordingly, it was formally dismissed from these proceedings, and its interests in this litigation continue to be represented by its insurer and subrogor, Federal Insurance Company. *See* Appendix A hereto at p. 3a.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
STATEMENT OF THE CASE	3
A. The Accident	3
B. The Defense and Indemnification Agreement	4
C. The Primary Theory of Liability Shifts from Defective Valve to Failure to Warn	4
D. The Indemnification Dispute	6
E. The Federal Lawsuit	7
F. Lowe's Waiver of its Breach of Contract Theories in the District Court	8
G. Lowe's Appeal to the Ninth Circuit	11
REASONS FOR GRANTING THE WRIT	14
I. THE NINTH CIRCUIT ERRED IN REVIVING CLAIMS WHICH LOWE HAD CLEARLY WAIVED	15
II. THE NINTH CIRCUIT DISREGARDED THIS COURT'S CAREFUL DISTINCTION BETWEEN WAIVER AND FORFEITURE	18
A. The General Rule of Forfeiture	19
B. The Distinction Between Waiver and Forfeiture	22

TABLE OF CONTENTS—Continued

Page

C. Lower Courts Have Failed to Apply the Forfeiture/Waiver Distinction in Civil Cases.... 24

CONCLUSION 27

APPENDIX 1a

TABLE OF AUTHORITIES

CASES — Page

Anderson v. Group Hospitalization, Inc., 820 F.2d 465 (D.C. Cir. 1987) 26
Beech Aircraft Corp. v. United States, 51 F.3d 834 (9th Cir. 1995) 18
Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 13, 14, 16-18
Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8 (8th Cir. 1999) 25
Fashauer v. New Jersey Transit Rail Operations, Inc., 57 F.3d 1269 (3rd Cir. 1995) 26
Freytag v. Commissioner, 501 U.S. 868 (1991) 14, 15, 22-24
Highlands Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh, 27 F.3d 1027 (5th Cir. 1994) 27
Hormel v. Helvering, 312 U.S. 552 (1941) 15, 20
In re Celotex Corp., 124 F.3d 619 (4th Cir. 1997) .. 26
In re U.S. Financial, Inc., 594 F.2d 1275 (9th Cir. 1979) 18
Medcom Holding Co. v. Baxter Travenol Laboratories, Inc., 106 F.3d 1388 (7th Cir. 1997) 26
Nelson v. City of Irvine, 143 F.3d 1196 (9th Cir. 1988) 18
Romano v. Howarth, 998 F.2d 101 (2nd Cir. 1993) .. 27
Rush v. Smith, 56 F.3d 918 (8th Cir. 1995) 27
Singleton v. Wulff, 428 U.S. 106 (1976) 15, 19, 20
Smith v. Kmart Corp., 177 F.3d 19 (1st Cir. 1999) 26
United States v. Olano, 507 U.S. 725 (1993) .. 1, 3, 14, 23-25
United States v. Perez, 116 F.3d 840 (9th Cir. 1997) 25
United States v. Salerno, 108 F.3d 730 (7th Cir. 1997) 25
United States v. Yu-Leung, 51 F.3d 1116 (2nd Cir. 1995) 25
University of Dist. of Columbia Faculty Ass'n/ NEA v. District of Columbia Financial Responsibility and Management Assistance Authority, 163 F.3d 616 (D.C. Cir. 1998) 26

TABLE OF AUTHORITIES—Continued

STATUTES	Page
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1332	2
28 U.S.C. § 2201	2
RULES	
Federal Rule of Criminal Procedure 24(c)	23
Federal Rule of Criminal Procedure 52(b)	24
LAW REVIEWS	
Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 Vanderbilt Law Review 1023 (1987)	20-21
Rhett R. Dennerline, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 Indiana Law Journal 985 (1989)	20

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Xomox Corporation and Emerson Electric Company (collectively "Xomox"), through their counsel, The Kobayashi Law Firm, P.C., respectfully pray that a writ of certiorari issue to review the judgment and opinion of a Panel of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 30, 1999. The Ninth Circuit opinion so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power, and to clarify the proper application in a civil context of the concepts of forfeiture and waiver articulated and highlighted by this Court in *United States v. Olano*, 507 U.S. 725, 733 (1993).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit filed April 30, 1999, that gives rise to this petition is reprinted in Appendix A hereto at pages 1a-9a. The Petition for Rehearing was denied by the Panel on June 14, 1999, and its Order is reprinted in Appendix B hereto at pages 10a-11a.

JURISDICTION

The United States District Court, Northern District of California, had jurisdiction over this action pursuant to 28 U.S.C. §§ 1332 and 2201. The District Court entered summary judgment in favor of Xomox on Lowe's breach of contract claim for failure to reimburse by written Order filed October 18, 1996, *see* Appendix G hereto at pages 23a-33a, and entered final judgment on May 21, 1997. Respondent Charles Lowe Company, represented by its insurer Federal Insurance Company (collectively "Lowe") appealed the judgment to the Ninth Circuit Court of Appeals, which affirmed in part and reversed in part in a Memorandum Opinion dated April 30, 1999. *See* Appendix A hereto at pages 1a-9a. The Ninth Circuit denied Xomox's timely-filed Motion for Rehearing on June 14, 1999. *See* Appendix B hereto at pages 10a-11a. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of the petition for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This factually and procedurally complex case concerns claims for indemnification by Charles Lowe Company ("Lowe"), a valve distributor, against Xomox, a valve manufacturer. Despite such complexity, the issue presented

to this Court is straightforward: Whether the distinction between forfeiture and waiver announced by this Court in *United States v. Olano*, 507 U.S. 725 (1993), should have been applied by the Ninth Circuit in this case, and should apply to civil cases in the Sixth, Tenth and Eleventh Circuits, as it has been properly applied in the First, Second, Third, Fourth, Fifth, Seventh, Eighth and D.C. Circuits.

The basis for the indemnification action is an underlying industrial accident and state court lawsuit in which both Xomox and Lowe were found liable to the state court plaintiffs.

A. The Accident

The accident giving rise to this litigation occurred at a Rhone-Poulenc chemical plant in Martinez, California in 1992. Two Rhone-Poulenc employees, Richard Sornborger and Luis Torres, were performing maintenance work on a sulfonic acid sludge line. Mr. Sornborger was injured and Mr. Torres was killed when they dismantled a valve on the line pressurized with acidic sludge. The valve was manufactured by a predecessor of Xomox and sold to the Martinez plant by Lowe in 1969. Both victims incorrectly believed that the line had been depressurized, and neither victim was wearing the protective clothing required by plant regulations.

Sornborger and Torres's survivors filed personal injury actions against Lowe and Xomox alleging that the valve was defective, and that Lowe and Xomox had failed to warn of the dangers of removing certain bolts on the valve. Lowe determined that the essential theory of liability was based on the defective valve, and therefore tendered its defense to Xomox on the grounds that any claims directed at Lowe were necessarily due to its role as the distributor of Xomox's allegedly defective valve.

B. The Defense and Indemnification Agreement

Xomox investigated the claim and determined to conditionally accept Lowe's tender of defense. Xomox's attorneys drafted a formal Defense and Indemnification Agreement, which stated, *inter alia,* that:

1. Xomox's assumption of the defense and indemnification obligation was "limited to claims or loss arising out of the allegedly defective design, manufacture or assembly" of the subject valve;
2. The assumption of the defense and indemnification obligation would continue only so long as the facts continued to indicate that plaintiffs' claims against Lowe were based solely on a theory of defective valve. In the event that Xomox became aware of credible evidence suggesting that plaintiffs' claims against Lowe were based upon something other than valve defect, Xomox would timely retender and withdraw from the defense and indemnification of Lowe;
3. Lowe knew of no facts suggesting that it and Xomox did not have a unity of interest in the defense of the action; and
4. Lowe was "not aware of any credible evidence to support any independent claim for liability for the acts or omissions of [Lowe], its employees or agents."

See Appendix C, pp. 12a-15a.

Based upon this conditional agreement, Xomox's attorneys undertook a joint defense of both Xomox and Lowe.

C. The Primary Theory of Liability Shifts from Defective Valve to Failure to Warn

Torres and Sornborger tried their case in June 1994. One of the issues at trial was whether Lowe should have forwarded to Rhone-Poulenc a copy of a 1986 warning

which Xomox had issued to distributors concerning the maintenance and repair of the type of valve at issue, but which Xomox had not specifically instructed Lowe to forward to Rhone-Poulenc.

At trial, Herb Roedel, a Lowe employee, unexpectedly testified on cross-examination by the plaintiffs that he received the warning from Xomox but intentionally chose not to pass it along to Rhone-Poulenc because Rhone-Poulenc had not "turned out to be one of his best customers." This surprise admission refocused plaintiffs' case from one of strict liability based on a defective valve design, to one of reckless and even outrageous conduct on the part of Lowe. *See* Appendix D, pp. 16a-18a. The shift in plaintiffs' primary liability theory only became fully apparent during the conference on jury instructions when plaintiffs' counsel sought punitive damages against Lowe, which the trial court ultimately refused. *Id.*

At this point in the proceedings, counsel for Xomox realized that two distinct theories of liability had developed: Xomox's allegedly defective valve, and Lowe's clearly negligent and possibly outrageous conduct in discriminating among its customers concerning who would receive warnings. The new theory of liability indicated that the condition precedent to defense and indemnification set forth in the Defense and Indemnification Agreement—that Xomox would only defend and indemnify Lowe for damages based on liability for a defective valve—was no longer satisfied. Accordingly, counsel for Xomox sent Lowe a letter informing it that while it was too late in the trial to withdraw its defense, Xomox would not continue to defend Lowe in the post-trial proceedings; and to the extent that the verdict indicated any liability against Lowe which rested upon a basis separate from a defective valve, Xomox would not indemnify Lowe. *See* Appendix D, pp. 16a-18a.

The jury returned general verdicts of $1.3 million for Sornborger and $2.06 million for Torres, based on theories of strict liability and negligence. The jury allocated 85% of the fault to plaintiffs and their employer Rhone-Poulenc, 10% to Lowe and 5% to Xomox. *See* Appendices E & F, pp. 19a-25a. While the general verdict apportioned liability, it did not specify the bases for the awards in terms of the underlying theories of liability. Lowe, through its insurance carrier Federal Insurance Company, paid $450,000 to each plaintiff in settlement of the judgments against it.

D. The Indemnification Dispute

Lowe demanded that Xomox indemnify it for the $900,000 it paid to the state court plaintiffs. Xomox rejected the demand, reasoning that: (1) a condition precedent to Xomox's obligation to indemnify was that the underlying liability be based solely on a theory of valve defect; and (2) Herb Roedel's stunning and surprise admission that he only favored his best customers with manfacturer's warnings, and therefore intentionally chose not to forward Xomox's warning to Rhone-Poulenc, clearly established a separate basis for Lowe's liability other than a defective valve. Lowe's independent liability was amply reflected by the verdict which found Xomox 5% liable but Lowe 10% liable for plaintiffs' damages—clearly more than pass-through liability for a defective valve.

In response, Lowe offered an alternative theory of breach of the indemnification agreement: that Xomox's attorneys should have been aware of this separate basis for liability and therefore retendered the defense back to Lowe much earlier. Xomox denied that it had any idea that Roedel would testify as he did on cross-examination, and maintained that a mere failure to forward a warning was fundamentally different from Roedel's surprise testi-

mony which showed intentional and perhaps outrageous conduct. Xomox maintained that it properly performed its duties under the defense and indemnification agreement by retendering Lowe's defense as soon as it became clear (which was not until toward the end of the state court trial) that the jury might determine liability against Lowe and Xomox on a basis other than valve defect.

E. The Federal Lawsuit

In February 1995, Lowe sued Xomox in federal court, alleging two primary causes of action: (1) breach of contract, based on Xomox's refusal to indemnify Lowe under the Defense and Indemnification Agreement, and (2) comparative equitable indemnification. Lowe sought to recover from Xomox the full $900,000 it had paid in settling the underlying state court lawsuits.

In its complaint, Lowe alleged three separate and independent theories of contract breach:

1. Xomox failed to reimburse Lowe for its $900,000 payment (the "failure to reimburse" theory, Complaint ¶ 23c);
2. Xomox failed to mount an adequate defense of Lowe in the state court trial (the "failure to defend" theory, Complaint ¶ 23a); and,
3. Xomox should have recognized the divergence of interests sooner, and therefore failed to timely retender Lowe's defense back to Lowe (the "failure to timely retender" theory, Complaint ¶ 23b).

See Appendix H, pp. 34a-35a.

Xomox asserted a counterclaim against Lowe for comparative equitable indemnification for the amounts it overpaid on the state court judgments on the jury's relative apportionment of liability.

F. Lowe's Waiver of its Breach of Contract Theories in the District Court

Lowe filed the first summary judgment motion in this litigation, seeking summary judgment solely on the failure to reimburse theory of its breach of contract claim. *See* Appendix G, p. 26a. Lowe argued that it had performed its portion of the Defense and Indemnity Agreement, and that Xomox had breached the Agreement by refusing to pay Lowe $900,000 in indemnification. Importantly, Lowe's summary judgment motion made absolutely no mention of Lowe's other theories of breach of contract: failure to defend and failure to timely retender. Lowe focused exclusively on Xomox's refusal to reimburse as the basis for its breach of contract claim.

Xomox responded by filing a counter-motion for summary judgment on breach of contract, which also focused solely on the indemnification obligation in the Defense and Indemnification Agreement. Xomox's counter-motion argued that Lowe could not establish a necessary element of its failure to reimburse theory of contract breach: that Lowe's liability in the underlying state court verdict was based only on a defective valve, which was a condition of Xomox's duty to indemnify and reimburse Lowe. Lowe had frankly admitted in its own summary judgment briefs that it was unable to prove that the state court general verdict reflected only valve defect liability as to Lowe and Xomox, because "the jury verdicts contain absolutely no indication of the basis for Lowe's liability." *See* Xomox's opening appellate brief, p. 7, quoting admissions in Lowe's opposition to Xomox's Counter-Motion for Summary Judgment.

Nowhere in any of the pleadings and papers filed on these cross-motions for summary judgment did Lowe even mention the two other theories of breach of contract which it had pled: failure to defend and failure to timely

retender. The circumstances surrounding these theories of breach support only one possible inference: that Lowe was intentionally abandoning these theories because Lowe could not prove that it suffered any damages under these theories of contract breach. Proceeding under these alternative theories of contract breach would have required Lowe to prove that if Xomox had retendered its defense and if Lowe had the opportunity to defend itself in the state court litigation, the outcome would have been different—that is, Lowe would not have been found liable to the state court plaintiffs (or less liable than 10%). Lowe could not hope to prove this, however, given the in-court admission of its own employee Herb Roedel which established the independent basis for Lowe's liability. As a result, the record reflects that Lowe made a deliberate decision to abandon its failure to defend and failure to timely retender theories of breach of the Defense and Indemnification Agreement.

The hearing on the motion and counter-motion for summary judgment on the breach of contract claims further evidences Lowe's intentional abandonment and waiver of its alternative theories of contract breach. At the hearing, the district court questioned counsel about the scope of the summary judgment motions to confirm that the only theory at issue was failure to indemnify. The following exchange occurred:

> [THE COURT]: But it is both, defense [and] indemnity—
>
> [XOMOX]: Yes. And we provided the defense. They are not saying here we didn't.
>
> [THE COURT]: So now your focus is on this, on the indemnity?
>
> [XOMOX]: Right. That is the focus of both our motions for summary judgment, is the indemnity.

> They have not submitted any evidence on this motion that we did not provide a defense. And indeed we did. They did not like the defense. . . .
>
> * * * *
>
> [THE COURT]: Is there anything you wanted to add?
>
> [LOWE]: Not really, your Honor.

The district court denied Lowe's motion and granted Xomox's counter-motion for summary judgment on the failure to reimburse breach of contract claim. *See* Appendix G, pp. 26a-29a. The district court denied Lowe's motion by reasoning that the jury's apportionment of liability—5% to Xomox and 10% to Lowe—logically compelled the conclusion that Lowe's liability had to be more than mere pass-through liability to a distributor on Xomox's manufacture of a defective valve, in which case Xomox had a sound justification for refusing to reimburse Lowe under the Defense and Indemnification Agreement. Further, the district court granted Xomox's counter-motion on the basis of Lowe's admission that it could not establish that the jury's verdict against Lowe and Xomox was based solely on valve defect. Accordingly, Xomox was entitled to summary judgment on the failure to reimburse breach of contract claim. *Id.*[1]

Lowe did not seek reconsideration of the district court's entry of summary judgment on the failure to reimburse

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[1] In a separate motion, Xomox sought summary judgment on Lowe's comparative equitable indemnification claims, arguing that the underlying final state court judgment estopped Lowe from bringing such a claim. The district court held that because Lowe and Xomox were on the same side of the underlying state court litigation, the state court verdict could have no preclusive effect under California law. The district court thus ruled that the claims for comparative equitable indemnification could proceed to trial, which would focus on how to apportion the liability as between Lowe and Xomox. *See* Appendix G, pp. 30a-33a.

claim. Lowe did not file any motion for summary judgment based on its alternative failure to defend and failure to timely retender theories of breach of contract. Nor did Lowe attempt to pursue these alternative theories in the remaining litigation, or even mention them in the Joint Pretrial Conference Statement. As the claims for comparative equitable indemnification proceeded towards trial, Xomox filed a motion *in limine* to exclude any evidence that its attorneys did not provide an adequate defense in the underlying state court litigation. Lowe did not file any opposition to this motion *in limine*, which the district court granted.

At trial on the comparative equitable indemnity claims, Lowe incorrectly presumed that it could rely on the underlying state court judgment to establish Xomox's liability, despite the trial court's prior ruling that the state court litigation had no preclusive effect as between Lowe and Xomox. Lowe acknowledged that it was not prepared to prove Xomox's liability without reference to the underlying state court verdict, and stipulated to the dismissal of its remaining equitable indemnification claims with prejudice, allowing the district court to enter a final judgment.

G. Lowe's Appeal to the Ninth Circuit

Once Lowe's district court strategy of raising only the breach of indemnity claim and abandoning its alternative theories of breach of contract had proven a failure, Lowe, through its insurer Federal, thereafter decided to raise its failure to defend and failure to timely retender theories of breach of contract for the first time on appeal to the Ninth Circuit Court of Appeals. Lowe mischaracterized the district court as having entered summary judgment on its failure to defend and failure to timely retender theories

sua sponte, and argued that the case should be remanded so these theories could be properly litigated.

Xomox responded by explaining to the Ninth Circuit how Lowe had waived these theories of breach of contract by its abandonment of them in the district court. Xomox noted that the waiver was the result of a tactical decision, rather than an inadvertent forfeiture, and cited authority for the proposition that Lowe may not raise these issues for the first time on appeal.

In its unpublished opinion, the Ninth Circuit completely and erroneously ignored the waiver issue, which had been expressly raised in the appellate briefs. Instead, the Ninth Circuit reversed the district court's summary judgment on breach of contract with the following warped and cursory analysis:

> We reverse the district court's grant of summary judgment with respect to the [breach of contract] action. Before the district court, Federal alleged that Xomox and Emerson breached the indemnity agreement in three ways: (1) by failure to indemnify; (2) by failure to defend; and (3) by failure to timely retender the defense. The facts it alleged supported its claims.
>
> As to the first theory, that Xomox and Emerson breached the indemnity agreement by failing to reimburse Lowe and Federal for the roughly $900,000 paid out in settlements, we conclude that Federal has demonstrated that a genuine issue of material fact precludes a grant of summary judgment. Xomox and Emerson make much of the fact that the indemnity agreement itself was limited to "loss arising out of the allegedly defective design, manufacture and assembly of the valve." At the same time, however, counsel for Xomox and Emerson conceded that Xomox was aware some time before the trial of

> Lowe's falure to pass along a warning to Rhone-Poulenc, and was prepared to indemnify Lowe for liability arising from this failure to warn. This is enough, we think, to raise a genuine issue of material fact regarding whether the indemnity agreement encompassed the settlements paid by Lowe and Federal.
>
> Xomox and Emerson failed to squarely address Federal's second and third theories—failure to defend and failure to timely retender the defense—in their motion for summary judgment before the district court. Accordingly, Xomox and Emerson failed to sustain the initial burden of pointing out the insufficiency of Federal's evidence as to these theories. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). For the foregoing reasons, we conclude that the district court erred in granting partial summary judgment in favor of Xomox and Emerson on Federal's first cause of action.

Appendix A, pp. 4a-5a.

The Ninth Circuit also affirmed the district court's resolution of the remaining claim for comparative equitable indemnification based on the district court's determination that Lowe could not rely on collateral estoppel to establish this claim against Xomox. *Id.* at 5a-6a. The Ninth Circuit thus remanded for further proceedings on Lowe's claim for breach of contract.[2]

Xomox petitioned for rehearing, strenuously arguing that Lowe had intentionally waived the failure to defend and failure to timely retender theories of breach of contract. Xomox also argued that the Ninth Circuit had effec-

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[2] The Ninth Circuit also reinstated Lowe's tortious interference with contract claim which both it and the district court acknowledged was entirely derivative of and dependent upon Lowe's breach of contract claim. *Id.* at 5a.

tively reversed the burden for obtaining summary judgment under *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) by requiring Xomox to anticipate and address every conceivable theory which Lowe might advance to defeat summary judgment. The Ninth Circuit denied the Petition for Rehearing in a *per curiam* order. *See* Appendix B, pp. 10a-11a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's opinion is more than merely wrong in its arbitrary and unexplained decision to ignore an explicit waiver. The Ninth Circuit's opinion demonstrates a profound misunderstanding of the difference between genuine waiver and forfeiture, a distinction which had been virtually forgotten until it was recently clarified and highlighted in this Court's civil and criminal jurisprudence. *See Freytag v. Commissioner*, 501 U.S. 868, 894, n.2 (1991) (Scalia, J., concurring in part and concurring in judgment) (distinguishing between waiver and forfeiture); *United States v. Olano*, 507 U.S. 725, 733 (1993).

Perhaps because this Court's recent clarification and discussion of the differences between waiver (an intentional abandonment of an issue) and forfeiture (a failure to timely assert an issue) occurred in the context of a criminal case, *Olano, supra*, the distinction has been observed and applied by lower federal courts mostly in the context of criminal cases. The lower federal courts, and the Ninth Circuit in particular, have been slow to observe the distinction in civil cases. Absent clarification by this Court, the Ninth Circuit, along with the Sixth, Tenth, and Eleventh Circuits, will continue to ignore or misapply *Olano*'s distinction between waiver and forfeiture in the civil context.

Had this distinction been observed here, the Ninth Circuit would have ruled that Lowe's alternative theories

of breach of contract (failure to defend and failure to retender) were not just forfeited because they were not timely raised in the district court, but were in fact waived because they had been intentionally abandoned by Lowe.

Allowing Lowe to resurrect these claims by raising them for the first time on appeal is precisely the sort of "sandbagging" which this Court has expressly disapproved, *see Freytag v. Commissioner*, 501 U.S. at 894, n.2, and falls outside the ambit of the Ninth Circuit's discretion to consider forfeited issues for the first time on appeal.

I. THE NINTH CIRCUIT ERRED IN REVIVING CLAIMS WHICH LOWE HAD CLEARLY WAIVED

The error in the Ninth Circuit's summary opinion is manifest. The record demonstrated and Xomox strenuously argued in its appellate briefs and Petition for Rehearing, that Lowe had waived its right to assert a breach of contract claim under theories of failure to defend or failure to timely retender the defense. Although the issue of waiver was fully joined, the Ninth Circuit completely ignored it in the opinion. The Ninth Circuit did not refute the fact of waiver, or even state that it was exercising its discretion to address a forfeited issue for the first time on appeal. *Cf. Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (affording circuit courts discretion to consider when they will consider issues raised for the first time on appeal); *Hormel v. Helvering*, 312 U.S. 552, 556-57 (1941) (same). Rather, the Ninth Circuit simply ignored the waiver issue—the essential issue presented by the case before it.

The Ninth Circuit's erroneous rulings on the substantive issue of whether summary judgment should have been granted in favor of Xomox on the failure to reimburse

breach of contract claim further underscores the inappropriateness of its unexplained decision to ignore waiver. The Ninth Circuit's first proffered reason for reversing the summary judgment was that there were disputed factual questions concerning when Xomox knew or should have known of Lowe's failure to pass along warnings to Rhone-Poulenc. Any such factual dispute would have no relevance to Xomox's duty to indemnify Lowe under the Defense and Indemnification Agreement, which was triggered if and only if the underlying state court judgment was based solely on a valve defect theory of liability. *See* Appendix C, p. 13a. Rather, Xomox's knowledge about Lowe's failure to warn would be relevant only to whether Xomox breached the contract by failing to retender Lowe's defense earlier. As the record and arguments before the Ninth Circuit demonstrated, Lowe deliberately chose not to raise this theory of breach of contract in the district court. The Ninth Circuit thus found an issue of fact in a claim which Lowe had never even raised, but had abandoned in the trial court.

The second reason proffered by the Ninth Circuit for reversing the summary judgment was that Xomox had not "squarely addressed" the failure to defend and failure to timely retender theories of breach of contract in its cross-motion for summary judgment. Of course, Xomox did not address these theories of contract breach for the same reason—because they had been abandoned below by Lowe and were never raised in the district court.

In this regard, the Ninth Circuit directly violated the burdens for summary judgment established by this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). *Celotex* expressly overruled prior caselaw which had been interpreted as requiring defendants seeking to obtain summary judgment to scour the record and essentially dis-

prove every possible claim and theory that the plaintiff might conceivably raise. *Id.* at 323. Instead, this Court held that henceforth a movant need only "inform[] the district court of the basis for its motion" and identify the materials which established that there were no disputed issues of fact in order to obtain summary judgment (or shift the burden to the non-movant to establish the existence of a genuine factual dispute). *Id.*

Here, Xomox informed the district court that it sought summary judgment on the failure to indemnify theory of breach of the Defense and Indemnification Contract; the district court correctly ruled that there was no possible dispute and that Xomox was entitled to summary judgment on this claim, because Lowe had admitted that it could not establish that its liability on the underlying state court verdicts was based solely upon Xomox's manufacture of a defective valve. Nothing in the Ninth Circuit's opinion disagrees with this aspect of the district court's ruling.

If Lowe wished, it could have raised its other theories of breach of contract at any time in the district court: in its own summary judgment motion; in response to Xomox's counter-motion; at the hearing on the summary judgment cross-motions; in a motion for reconsideration of the summary judgment order; or at any time during the litigation of the remaining claims for comparative equitable indemnification. All Lowe needed to do was make the district court aware that it had two other theories of breach of contract in its complaint, which the district court had not ruled upon. Instead, Lowe never brought these other theories to the district court's attention, but chose to abandon them. Xomox had no reason or obligation to search the record for any possible theories which Lowe might conceivably raise, and address these theories

in order to obtain a summary judgment. *See Celotex*, 477 U.S. at 323.

Lowe's waiver and knowing abandonment of these two alternative theories was explicit and unqualified, which makes the Ninth Circuit's decision to revive them when Lowe raised them for the first time on appeal utterly inexplicable, and indeed contrary to the Ninth Circuit's own law on the issue. *See, e.g., Beech Aircraft Corp. v. United States*, 51 F.3d 834, 840-41 (9th Cir. 1995) (refusing to permit appellant to raise a new theory of its claim for the first time on appeal in order to reverse a summary judgment); *Nelson v. City of Irvine*, 143 F.3d 1196, 1206 (9th Cir. 1988) (stating general rule that "except in the case of jurisdictional questions or where particular circumstances indicate that injustices might otherwise result or where public policy requires, this Court declines to consider arguments for reversal not presented to the district court."), quoting *In re U.S. Financial, Inc.*, 594 F.2d 1275, 1282 (9th Cir. 1979). Indeed, perhaps because its decision to ignore the waiver was so unprincipled and inexplicable, the Ninth Circuit offered no explanation for its disregard of this issue, but retreated into a safe harbor of unlimited and uncontrolled discretion buried in an unpublished opinion.

II. THE NINTH CIRCUIT DISREGARDED THIS COURT'S CAREFUL DISTINCTION BETWEEN WAIVER AND FORFEITURE

If the extent of the Ninth Circuit's error had been to improperly permit an issue to be raised for the first time on appeal, even without any explanation, Xomox acknowledges that such error might not in itself rise to the level meriting certiorari review by this Court. Given the discretion that this Court has granted to the circuit courts to determine whether and under what circumstances

they will consider issues raised for the first time on appeal, even the Ninth Circuit's gross abuse of that discretion in the present case might not justify review. The Ninth Circuit's error, however, cannot be characterized as a mere abuse of discretion, but directly violates the jurisprudence of waiver recently articulated by this Court.

A. The General Rule for Forfeiture

In *Singleton v. Wulff*, 428 U.S. 106 (1976), this Court had established a rule of general discretion concerning when a circuit court may choose to consider an argument raised for the first time on appeal. *Singleton* involved two doctors who sued the Missouri official in charge of Medicaid services over the constitutionality of a Missouri law restricting Medicaid funding of abortions. The district court dismissed the suit for lack of standing. The court of appeals reversed the standing ruling, and then proceeded to decide the constitutional issue on the merits even though the Missouri official had never even answered the complaint. This Court held that the circuit court abused its discretion in deciding the merits of the case in the first instance, where no arguments had ever been presented or developed below, and the Missouri official had not even had an opportunity to respond in the district court. This Court held:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, . . . or where "injustice might otherwise result." Suffice it to say that this is not such a case. The issue re-

> solved by the Court of Appeals have never been passed upon in any decision of this Court. This being so, injustice was more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard.

Singleton, 428 U.S. at 121, quoting *Hormel v. Helvering,* 312 U.S. 552, 557 (1941) (setting forth similar discretionary approach to forfeiture of issues).

Based upon this grant of discretion, the circuit courts have approached the issue of forfeiture without due regard for consistency and fairness, and have made a mess of this area of the law. Scholarly commentators have summed up the chaotic state of the law:

> When confronted with a new issue on appeal, these appellate courts explain that the general rule is merely a rule of practice created by the courts themselves and the decision to hear an issue is up to the court's own discretion. However, although these courts uniformly recognize their discretionary authority to hear new issues on appeal, there is no uniform method by which the appellate courts exercise this discretion. That is, between circuits there is no discernable set of guidelines for deciding when a new issue should be heard. Even within circuits there is no consistency. The Supreme Court essentially had found this area of the law a mess and left it a mess.

Rhett R. Dennerline, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal,* 64 Indiana Law Journal 985, 1004-05 (1989).

> Inconsistency in the recognition and application of exceptions to the general rule is easily demonstrated. . . . [I]n the federal courts, . . . [t]he principal problem is not so much that one circuit will allow an exception and another will not (although that problem

> does exist), but that the various circuits are creating an ever expanding list of exceptions with little or no regard to prior case law, previously developed criteria, or limitations imposed in earlier cases. The statement in Singleton that '[w]e announce no general rule,' while intended to describe the lack of any specific limitations on exceptions to the general rule means, in effect, that the general rule is no longer a general rule.
>
> If the courts attempted to develop objective criteria for determining when an exception should be recognized and simply differed on the application of the criteria, inconsistency in the recognition of exceptions to the general rule would not be a matter of great concern. The cases indicate, however, that very few courts have attempted to develop objective criteria. In the overwhelming majority of cases the court merely decides whether or not to recognize an exception, giving no rationale for its action. If the court refuses to consider the new issue it merely recites the general rule. If the court does consider the new issue, it simply states the exception to the rule (with or without citing authority for allowing the exception). The question is resolved in conclusory terms with little or no analysis to support whatever decision is made. As a result, the dominant characteristic of the application of the general rule and its exceptions is inconsistency.

Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule,* 40 Vanderbilt Law Review 1023, 1058-59 (1987).

Despite these calls for a reformation of the varying approaches to the issues of forfeiture and waiver in the federal courts, this Court has not chosen to formally revisit the issue, but has left the lower federal courts to continue their unprincipled exercise of unbridled discre-

tion in deciding when to consider issues raised for the first time on appeal, despite the resulting inconsistency, inefficiency, unpredictability, unfairness and occasional miscarriages of justice that result.

B. The Distinction Between Waiver and Forfeiture

In 1991, this Court discussed the implications for federal appellate jurisprudence associated with the fact that not all issues raised for the first time on appeal arrive in the appellate court on equal footing. Some issues might be forfeited through an inadvertent failure to timely raise them in the trial court, whereas other issues might be genuinely waived through intentional abandonment or relinquishment, often for tactical reasons.

In his concurrence in *Freytag v. Commissioner,* 501 U.S. 868 (1991), Justice Scalia noted this important distinction between forfeiture and waiver which had been nearly lost through decades of non-use. *Id.* at 894, n. 2. *Freytag,* a civil tax case, involved a challenge to the Chief Judge of the Tax Court's assignment of an important and expensive tax case to a special trial judge for adjudication. The petitioneors consented to the assignment, and only after the special trial judge ruled against them did they challenge the constitutionality of the assignment on separation of powers grounds. *Id.* at 878. The majority held that the important constitutional principles at issue justified making an exception to the general waiver rule that a non-jurisdictional claim may not be considered for the first time on appeal. *Id.* at 878-79.

Justice Scalia, joined by Justices O'Connor, Kennedy and Souter, concurred in the judgment, but wrote separately to voice their disagreement with the majority's waiver analysis. Justice Scalia reviewed the important principles of waiver—how the rule is not a mere tech-

nicality, but is essential to the orderly administration of justice. The fact that the issue waived involved weighty, "structural" constitutional principles did not justify making an ad hoc exception to the rule.

> To abandon the principle is to encourage the practice of "sandbagging": suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later—if the outcome is unfavorable—claiming that the course followed was reversible error.

Id. at 895.

Justice Scalia's concurrence also thoughtfully revived the all-but-forgotten distinction formerly observed between forfeiture and waiver. *Id.* at 894, n.2. The concurrence argued that although the case at bar was a genuine waiver (because the petitioners had affirmatively consented at trial to the procedure which they subsequently challenged on appeal), the petitioners' arguments should not be entertained even if they had been inadvertently forfeited below. *Id.*

This distinction between waiver and forfeiture reappeared in this Court's jurisprudence two years later in the criminal case of *United States v. Olano*, 507 U.S. 725 (1993).[3] In its discussion of general principles of waiver, this Court incorporated Justice Scalia's concurrence in *Freytag*, by formally observing:

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[3] *Olano* was a criminal case in which two alternate jurors were permitted to attend the jury's deliberations but not participate. The alternates' presence during deliberations violated Federal Rule of Criminal Procedure 24(c), which requires that alternate jurors be discharged when the jury retires to consider its verdict. This Court held that the rule violation was forfeited through a failure to timely object, was plain error, but was not prejudicial and did not require reversal.

> Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right."
>
> * * * *
>
> Mere forfeiture, as opposed to waiver, does not extinguish an "error" under [Federal Rule of Criminal Procedure] 52(b).

Olano, 507 U.S. at 733 (citing Justice Scalia's concurrence in *Freytag*, 501 U.S. 868, 894, n.2).

This Court thus held in *Olano* that forfeiture of an issue in the trial court does not prevent the issue from being considered for the first time on appeal under F.R. Crim.P. 52(b), the criminal "plain error" rule. Waiver of an issue, by contrast, results in the elimination of the issue from the litigation, so that it cannot be considered for the first time on appeal. Indeed, any other approach to genuine waiver of an issue would permit precisely the sort of "sandbagging" denounced by Justice Scalia's concurrence in *Freytag* and incorporated into *Olano* by reference.

C. Lower Courts Have Failed to Apply the Forfeiture/Waiver Distinction in Civil Cases

The logical result of the forfeiture/waiver distinction articulated in *Olano* is to require the circuit courts to examine their decisions of what is appropriately deemed a forfeiture or waiver (beyond the absence of any general rule as discussed in *Singleton v. Wulff*). Under *Olano*, the discretion to consider issues raised for the first time on appeal applies only to issues which have been forfeited below. Where an issue has been waived, the issue is and ought to be regarded as permanently removed from the litigation, such that a disappointed litigant cannot attempt to revive it by raising it for the first time on appeal,

hoping that the appellate court will exercise unbridled discretion to consider it. *Olano*, 507 U.S. at 733.

Olano's discussion of waiver was based on general principles of appellate jurisprudence, cited both civil and criminal cases, and is therefore equally applicable in both a civil as well as a criminal context. Indeed, because life and liberty are generally not at stake in civil proceedings, and because waived issues cannot resurface later in a habeas proceeding under the guise of ineffective assistance of counsel, the rationale for a strict application of waiver applies far more forcefully in the civil context. *See Olano*, 507 U.S. at 735-36.

Perhaps because the waiver/forfeiture distinction was announced in a criminal case, however, lower federal courts have applied it largely in the criminal context. The Ninth Circuit did so most notably in the case of *United States v. Perez*, 116 F.3d 840 (9th Cir. 1997). There, the Ninth Circuit cited *Olano* for the basic proposition that "Forfeited rights are reviewable for plain error, while waived rights are not." *Id.* at 845. The Ninth Circuit also noted that a defendant might waive an issue without an express on-the-record relinquishment, but by failing to raise the issue in the trial court for tactical reasons. *Id.* at 845-46. *Accord Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 15 (8th Cir. 1999) (tactical decisions can constitute waiver); *United States v. Salerno*, 108 F.3d 730, 740 (7th Cir. 1997) (where "defendant was well aware of the potential need for such a limiting instruction . . . his lack of request for such an instruction coupled with his affirmative acceptance of the court's final jury instructions demonstrates that he intentionally relinquished his known right."); *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2nd Cir. 1995) ("If, however, the party consciously refrains from objecting as a tactical matter, then that action constitutes a true 'waiver,' which will

negate even plain error review"); *Anderson v. Group Hospitalization, Inc.*, 820 F.2d 465, 469-70 (D.C. Cir. 1987) (failure to object to evidence at trial for tactical reasons resulted in waiver which would not be reviewed for plain error).

Had the Ninth Circuit applied these basic principles of waiver to the instant case, it would have concluded that Lowe waived its right to raise its failure to defend and failure to timely retender theories of breach of contract for the first time on appeal. Lowe pled these theories in its complaint, but then made the decision not to raise these theories in the trial court—a decision which the record fairly establishes was an intentional, tactical decision based upon the difficulties injected by Lowe's employee's stark admissions against interest. Lowe instead focused solely on the breach of the duty to reimburse.

The Ninth Circuit, however, has never applied *Olano*'s sharp distinction between waiver and forfeiture in a published civil case. Along with the Sixth, Tenth and Eleventh Circuits, the Ninth Circuit has published no cases indicating that the Ninth Circuit understands that this Court's revival of the waiver/forfeiture distinction in *Olano* applies in the civil context to eliminate plain error review in cases of genuine waiver.[4] The Ninth Circuit's

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[4] Published civil cases from the majority of the federal circuits applying *Olano*'s waiver/forfeiture distinction include *Smith v. Kmart Corp.*, 177 F.3d 19, 25-26 (1st Cir. 1999); *University of Dist. of Columbia Faculty Ass'n/NEA v. District of Columbia Financial Responsibility and Management Assistance Authority*, 163 F.3d 616, 625 (D.C. Cir. 1998); *In re Celotex Corp.*, 124 F.3d 619, 631 (4th Cir. 1997); *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388, 1396 (7th Cir. 1997); *Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1288

refusal or reluctance to apply *Olano*'s distinction between waiver and forfeiture in its civil jurisprudence will continue to result in practices of "sandbagging" and miscarriages of justice such as the present case.

CONCLUSION

Since the recent re-articulation by this Court of the critically important distinction between waiver and forfeiture in *Olano*, the Ninth Circuit's deliberate and unexplained refusal to apply the law of waiver can no longer be accurately rationalized as being an issue of the circuit courts' unbridled and virtually unlimited exercise of discretion as to what issues are properly reviewable when first raised at the circuit level, as contemplated by this Court's prior caselaw, such as *Singleton v. Wulff*, 428 U.S. 106 (1976). Rather, the Ninth Circuit's error in this case violates this Court's rule of waiver announced in *Olano*, and constitutes the sort of departure from the proper course of judicial proceedings and the administration of justice as to merit this Court's review. Moreover, the failure of the Sixth, Ninth, Tenth and Eleventh Circuits to incorporate the rule of *Olano* into their civil jurisprudence is an important matter of federal appellate practice which should be corrected and clarified by this Court.

(3rd Cir. 1995); *Rush v. Smith*, 56 F.3d 918, 925 (8th Cir. 1995); *Highlands Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh*, 27 F.3d 1027, 1031-32 (5th Cir. 1994); *Romano v. Howarth*, 998 F.2d 101, 104 (2nd Cir. 1993).

Because the remaining circuits have not expressly rejected the application of the *Olano* distinction in a civil context, there is no true circuit split. Rather, the failure of the Ninth Circuit and other circuits to apply *Olano* gives rise to the continuing likelihood that these circuits will continue to misapply federal law in this regard.

For the above reasons, the petition for writ of certiorari should be granted and a writ of certiorari should be issued.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Apr. 30, 1999]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 97-16239
D.C. CV-95-00498-SI

CHARLES LOWE CO.; FEDERAL INSURANCE CO.,
Plaintiffs-Counter-defendants-Appellants,

v.

XOMOX CORP.,
Defendant-Counter-claimant-Appellee,

EMERSON ELECTRIC CO.,
Defendant-Appellee.

No. 97-16290
D.C. CV-95-00498-SI

CHARLES LOWE CO.; FEDERAL INSURANCE CO.,
Plaintiffs-Counter-defendants-Appellees,

v.

XOMOX CORP.,
Defendant-Counter-claimant-Appellant,

EMERSON ELECTRIC CO.,
Defendant-Appellant.

No. 98-15374
D.C. No. CV-95-00498

CHARLES LOWE CO.; FEDERAL INSURANCE CO.,
Plaintiffs-Counter-defendants-Appellees,

v.

XOMOX CORP.,
Defendant-Counter-claimant-Appellant.

MEMORANDUM [1]

Appeal from the United States District Court
for the Northern District of California
Susan Y. Illston, District Judge, Presiding

Argued and submitted November 3, 1998
San Francisco, California

Before: B. FLETCHER and TASHIMA, Circuit Judges, and FITZGERALD,[2] District Judge.

The Charles Lowe Company ("Lowe") and Federal Insurance Company ("Federal") appeal from the district

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

[2] The Honorable James M. Fitzgerald, Senior District Court Judge for the District of Alaska, sitting by designation.

court's grant of partial summary judgment as to their first and fourth causes of action, as well as the district court's dismissal of their second and third causes of action.[3] Xomox Corporation ("Xomox") and Emerson Electric Company ("Emerson") cross-appeal from the district court's dismissal of their counter-claim for comparative equitable indemnity. In a separate consolidated appeal, Xomox appeals from the district court's postjudgment denial of Xomox's motion for costs. The district court had jurisdiction pursuant to 28 U.S.C. § 1332 and 2201. We have jurisdiction pursuant to 28 U.S.C. § 1291.[4]

1. Lowe's Corporate Suspension

Xomox and Emerson challenge Lowe's capacity to bring this appeal, in light of Lowe's corporate suspension. It is well-settled under California law that a delinquent corporation may not appeal from an adverse judgment. *See United States v. 2.61 Acres of Land*, 791 F.2d 666, 668 (9th Cir. 1985). Lowe's corporate status was suspended on March 17, 1997 and remained suspended as of the date of oral argument. Lowe does not dispute its suspended status. Accordingly, Lowe may not maintain this appeal and is hereby dismissed as an appellant. Xomox and Emerson do not challenge Federal's right to proceed in this appeal on behalf of Lowe, its insured.

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[3] Federal has also moved to strike portions of Xomox and Emerson's Reply Brief in connection with this appeal. While we agree that sections III, IV, and V of the Reply Brief appear to be attempts to get an improper final bite at the apple, the offending sections merely repeat arguments properly raised in earlier briefing and thus are harmlesss. Accordingly, Federal's motion is DENIED.

[4] The parties are familiar with the facts, and we will recite them only to the extent necessary for our disposition of these appeals.

2. Federal's Appeal

In an order filed October 18, 1996, the district court granted partial summary judgment in favor of Xomox and Emerson on Federal's first cause of action (breach of contract). Partial summary judgment is appropriate where the submissions of the parties, viewed in the light most favorable to the nonmoving party, demonstrate that there exist no genuine issues of material fact as to a particular claim or defense. *See Amdahl Corp. v. Profit Freight Sys., Inc.*, 65 F.3d 144, 146 (9th Cir. 1995). We review the district court's ruling *de novo*. *See id.*

We reverse the district court's grant of summary judgment with respect to the first cause of action. Before the district court, Federal alleged that Xomox and Emerson breached the indemnity agreement in three ways: (1) by failure to indemnify; (2) by failure to defend; and (3) by failure to timely retender the defense. The facts it alleged supported its claims.

As to the first theory, that Xomox and Emerson breached the indemnity agreement by failing to reimburse Lowe and Federal for the roughly $900,000 paid out in settlements, we conclude that Federal has demonstrated that a genuine issue of material fact precludes a grant of summary judgment. Xomox and Emerson make much of the fact that the indemnity agreement itself was limited to "loss arising out of the allegedly defective design, manufacture and assembly of the valve." At the same time, however, counsel for Xomox and Emerson conceded that Xomox was aware some time before the trial of Lowe's failure to pass along a warning to Rhone-Poulenc, and was prepared to indemnify Lowe for liability arising from this failure to warn. This is enough, we think, to raise a genuine issue of material fact regarding whether the in-

demnity agreement encompassed the settlements paid by Lowe and Federal.

Xomox and Emerson failed to squarely address Federal's second and third theories—failure to defend and failure to timely retender the defense—in their motion for summary judgment before the district court. Accordingly, Xomox and Emerson failed to sustain the initial burden of pointing out the insufficiency of Federal's evidence as to these theories. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). For the foregoing reasons, we conclude that the district court erred in granting partial summary judgment in favor of Xomox and Emerson on Federal's first cause of action.

We also reverse the district court's grant of partial summary judgment to Xomox and Emerson on Federal's fourth cause of action (tortious interference with contract). The district court's ruling as to this cause of action was premised entirely on its grant of summary judgment denying Federal's first cause of action. The reversal of that ruling vitiates the district court's rationale as to the fourth cause of action, leading us to reverse.

We affirm the district court's dismissal of Federal's second (equitable indemnity) and third (declaratory relief) causes of action. The dismissals and subsequent entry of judgment on these causes of action turn on California collateral estoppel principles. This court reviews this question of law *de novo*. *See Bates v. Union Oil Co.*, 944 F.2d 647, 649 (9th Cir. 1991). It is clear that a plaintiff seeking equitable indemnity under California law has the burden of proving fault on the part of the party from whom indemnity is sought. *See National Union Fire Ins. Co. v. Showa Shipping Co.*, 47 F.3d 316, 322-23 (9th Cir. 1995). Federal conceded on the day of trial that it intended to rely on the underlying state court verdict in order to establish this element of its claim. Federal fur-

ther conceded that it was not prepared to offer alternative evidence, and that it was not prepared to prove Xomox's fault anew.

We agree with the district court that, under the California law of collateral estoppel, Federal could not rely on the state court verdict to show Xomox's fault. Under California law it is well-established that parties to a judgment are not bound by it in a subsequent controversy between themselves unless they were adverse parties, one against the other, in the original action. *See* CAL. CIV. PROC. CODE § 1910; *Standard Oil Co. v. John P. Mills Org.*, 3 Cal.2d 128, 139-41 (1935); *Great Western Furniture Co. v. Porter Corp.*, 238 Cal. App. 2d 502, 509 (1965); 7 B.E. WITKIN, CALIFORNIA PROCEDURE, JUDGMENTS § 389 (4th ed. 1997). Federal does not contest the nonadversarial posture of the codefendants in the prior action—Lowe and Xomox shared a common defense and filed no cross-claims against each other. "Ordinarily, therefore, where the plaintiff and defendant in the subsequent action were merely codefendants in the original action, the prior judgment cannot be used by one against the other as an estoppel since they were not advers[e] parties in the original action and no issues were raised or adjudicated between them therein." *Great Western Furniture*, 238 Cal. App. 3d at 509. California has consistently applied its "nonadverse codefendant" doctrine, *see e.g., Atherley v. MacDonald, Young & Nelson, Inc.*, 135 Cal. App. 2d 383 (1955), and we hold that the doctrine applies here to preclude Federal from relying on the state court judgment to prove Xomox's fault.

3. Xomox and Emerson's Cross-Appeal

The district court dismissed Xomox and Emerson's counter-claim against Lowe for comparative equitable indemnity. In their cross-appeal, Xomox and Emerson chal-

lenge the dismissal on two grounds: (1) that the district court erred in denying Xomox and Emerson's motion for default judgment and (2) that the dismissal was based on an erroneous understanding of California collateral estoppel principles. We take the two contentions in turn and affirm.

The district court's denial of a default judgment is reviewed for an abuse of discretion. *See Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). We may affirm on any ground finding support in the record. *Id.* Xomox and Emerson argue that Lowe's suspended corporate status requires that its pleadings be struck, clearing the way for a default judgment in favor of Xomox and Emerson. *See Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp.*, 155 Cal. App. 2d 46, 50-51 (1957). Up until the time of its last answer, however, Lowe was in good standing. When it filed its pleadings responding to Xomox and Emerson's counter-claims, it was in good standing. Accordingly, the district court did not abuse its discretion in refusing to strike Lowe's pleadings and in denying Xomox and Emerson's motion for default judgment.

As noted above, we review the district court's application of California collateral estoppel principles *de novo*. *See Bates*, 944 F.2d at 649. According to Xomox and Emerson, the dismissal was based on the district court's erroneous ruling that neither party could assert the prior state court judgment as an estoppel against the other. In Xomox and Emerson's view, this ruling was erroneous as applied to Lowe becasue Lowe, by agreeing to a unified defense in the state court action, "waived" its right to take an adverse position to Xomox. Consequently, Xomox and Emerson reason that Lowe should have been bound in this proceeding by the prior state court judgment.

We reject Xomox and Emerson's proposed gloss on California collateral estoppel principles as flatly contrary to California's "nonadverse codefendant" doctrine. Xomox and Emerson are attempting to use the state court judgment to establish the proportionate liability as between Lowe and Xomox—precisely the sort of estoppel barred by a long line of California precedents. *See generally* 7 B.E. WITKIN, CALIFORNIA PROCEDURE, JUDGMENTS § 389. The proportionate liability of the codefendants was never litigated as between the codefendants in the state court action, and accepting Xomox and Emerson's argument would effectively prevent the issue from *ever* being litigated in any court. This evil is precisely what California's nonadverse codefendant doctrine aims to prevent, and Xomox and Emerson have not offered any authority suggesting that the California courts would embrace an "implied waiver" approach to end-run the doctrine in a context where it would otherwise plainly be applicable.

4. Xomox's Appeal Regarding Costs

Xomox also appeals from the district court's order denying its motion for costs. The allowance or disallowance of costs by the district court pursuant to Rule 54(d) is reviewed for an abuse of discretion. *See National Info. Services, Inc. v. TRW, Inc.*, 51 F.3d 1470, 1471 (9th Cir. 1995). We conclude that the district court did not abuse its discretion here. Having reviewed the record, we agree with Federal:

> The bottom line in this litigation was that nobody won and everybody lost. The record reasonably supports no other conclusion.

In short, the district court did not abuse its discretion in concluding that neither party deserved the "prevailing party" title. We affirm.

5. Conclusion

Lowe's appeal is DISMISSED. The district court's grant of summary judgment in favor of Xomox and Emerson as to Federal's first and fourth causes of action is REVERSED and REMANDED. The district court's dismissal of Federal's second and third causes of action is AFFIRMED. The district court's dismissal of Xomox and Emerson's counter-claim for comparative equitable indemnity is AFFIRMED. The district court's denial of Xomox's motion for costs is AFFIRMED.

Each party shall bear its own costs on appeal.

APPENDIX B

[Filed Jun. 14, 1999]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 97-16239
D.C. No. CV-95-00498-SI/BZ

CHARLES LOWE CO.; FEDERAL INSURANCE CO.,
Plaintiffs-Counter-defendants-Appellants,

v.

XOMOX CORP.,
Defendant-Counter-claimant-Appellee,

EMERSON ELECTRIC CO.,
Defendant-Appellee.

No. 97-16290
CV-95-00498-SI

CHARLES LOWE CO.; FEDERAL INSURANCE CO.,
Plaintiffs-Counter-defendants-Appellees,

v.

XOMOX CORP.,
Defendant-Counter-claimant-Appellant,

EMERSON ELECTRIC CO.,
Defendant-Appellant.

No. 98-15374
D.C. No. CV-95-00498-SI-BZ

CHARLES LOWE CO.; FEDERAL INSURANCE CO.,
Plaintiffs-Counter-defendants-Appellees,

v.

XOMOX CORP.,
Defendant-Counter-claimant-Appellant,

ORDER

Before: B. FLETCHER and TASHIMA, Circuit Judges, and FITZGERALD,[1] District Judge.

The petition for rehearing is DENIED.

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[1] The Honorable James M. Fitzgerald, Senior District Court Judge for the District of Alaska, sitting by designation.

APPENDIX C

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March 21, 1994

Kenneth L. Dziesinski
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Re: *Sornborger v. Xomox Corp.*
Torres v. Emerson Electric
C93-0281 Consolidated With C93-02699

Dear Mr. Dziesinski:

This is in response to your February 18, 1994 letter requesting that Xomox Corporation defend and indemnify Charles Lowe Company in the *Sornborger* and *Torres* lawsuits. Xomox Corporation ("Xomox") agrees to assume the defense of and will idemnify Charles Lowe Company against loss arising out of the allegedly defective design, manufacture and assembly of the valve that forms the subject matter of plaintiffs' claims against

Xomox and Charles Lowe Company in the captioned, consolidated actions, conditioned upon the following terms:

1. This assumption of defense and indemnification is limited to claims or loss arising out of the allegedly defective design, manufacture, or assembly by Xomox of the specific valve that forms the subject matter of plaintiffs' claims against Xomox and Charles Lowe Company in the captioned, consolidated actions.

2. This assumption of defense and indemnification is effective upon Charles Lowe Company's written agreement to these terms, but will continue only so long as the facts continue to indicate that plaintiffs' claims against Charles Lowe Company are based solely on the design, manufacture, or assembly by Xomox of the specified valve that forms the subject matter of plaintiffs' claims against Xomox and Charles Lowe Company. In the event that Xomox becomes aware of credible evidence suggesting that plaintiffs' claims against Charles Lowe Company are based on matters other than the design, manufacture, or assembly by Xomox of the specific valve that forms the subject matter of plaintiffs' claims against Xomox and Charles Lowe Company. Xomox shall timely retender and withdraw from the defense and indemnification of Charles Lowe Company.

3. Charles Lowe Company knows of no facts or circumstances that would or could suggest that Charles Lowe Company and Xomox do not have a unity of interest in the defense of this lawsuit. Charles Lowe Company is not aware of any credible evidence to support any independent claim of liability for the acts or omissions of Charles Lowe Company, its employees or agents.

4. Charles Lowe Company consents to the employment of the attorneys selected by Xomox and agrees to

waive any conflict of interest claims that may later arise in the event Xomox or its counsel become aware of evidence adverse to Charles Lowe Company's interests or in the event that Xomox invokes its right to retender the defense and indemnification as set forth in paragraph 2 of this letter. Charles Lowe Company will raise no objection to Xomox's continuing use of those counsel engaged by Xomox at any stage of the proceedings in the event of a retender.

5. Charles Lowe Company will pay all attorneys fees and costs of its own defenses up to the point of Xomox's assumption of the defense; Xomox will pay subsequent fees and expenses of this action during a period of assumption of the defense so long as counsel for Xomox also represents Charles Lowe Company. In the event Xomox retenders Charles Lowe Company's defense, Charles Lowe Company will reimburse Xomox for those expenses, if any, incurred solely on Charles Lowe Company's behalf during the period of assumption of defense.

6. Charles Lowe Company will cooperate fully with Xomox's investigation and defense of this action, including, but not limited to, making available for review by Xomox or its attorneys all related records and files of Charles Lowe Company and Charles Lowe Company's counsel that Xomox or its attorneys determine may have any bearing on the defense of the captioned consolidated action. Charles Lowe Company will also provide witnesses to be present, or testify, at any deposition, mediation or trial, if requested to do so by Xomox or its attorneys.

7. Charles Lowe Company represents that no default judgment has been entered against Charles Lowe Company as of the date of this agreement and no admission of liability has been made by or on behalf of Charles

Lowe Company or its agents, or employees that would or could affect the defense of this case.

8. Charles Lowe Company will instruct and permit its present counsel to forward to Xomox's counsel, Snell & Wilmer, a copy of its investigative file, expert witness reports, photographs and any of the documents which it may have generated or received in connection with the defense of Charles Lowe Company to date.

9. Charles Lowe Company will dismiss without prejuice any of the cross-complaints it filed against Xomox.

Please confirm in writing your client's agreement with the conditions outlined above by sending an executed copy of this letter back to me along with an executed substitution of counsel form and a file endorsed copy of a dismissal(s) of all cross-complaints filed by Charles Lowe Company against Xomox and Emerson Electric Company. If you have any questions, please call.

Very truly yours,

SNELL & WILMER

/s/ Luke A. Torres
LUKE A. TORRES

The above has been fully explained by the current attorneys for Charles Lowe Company in the captioned consolidated actions and is agreed to and accepted:

Dated: March 24, 1994

/s/ [Illegible]
On behalf of Charles Lowe Company

Approved:

Dated: 3/24/94

/s/ Kenneth L. Dziesinski

APPENDIX D

Snell & Wilmer
Law Offices
One Arizona Center
Phoenix, Arizona 85004-0001
(602) 382-6000
Fax: (602) 382-6070

June 28, 1994

Kenneth L. Dziesinski, Esq.
BRAGG & DZIESINSKI
Attorneys at Law
Two Embarcadero Center, Suite 880
San Francisco, CA 94111

Re: *Sornborger and Torres v. Xomox*

Dear Mr. Dziesinski:

As you know, Xomox Corporation assumed the defense of Charles Lowe Company in the captioned action when it appeared that Charles Lowe Company's liability to plaintiffs would be limited to its status as the retail seller of the Xomox plug valve. The case has now been in trial for over two weeks and, until this week, this appeared to be the sole basis for plaintiffs' claims against Charles Lowe Company. However, on June 27, 1994, during a conference with Judge James Marchiano to discuss jury instructions, the plaintiffs attorneys told us that, during closing arguments now scheduled for Wednesday, June 29, 1994, they intend to argue that Charles Lowe Company should be found liable to the plaintiffs for reasons other than those relating to the design, manufacture or assembly of the Xomox plug valve. The plaintiffs will rely on testimony given by Herb Roedel during the trial in which Mr. Roedel said that he may only have distributed a

warning about cover-mounting published by Xomox in 1983 to his best customers. Mr. Roedel also said that Stauffer Chemical Company was not one of his best customers and, for this reason, he may not have sent the warning to it. For your convenience, I enclose a copy of the transcript containing Mr. Roedel's trial testimony.

Based on what the plaintiffs' attorneys told us yesterday, we expect them to argue that, at a minimum, Mr. Roedel's practice of distributing warnings issued by Xomox to only his best customers was tantamount to negligence. We also expect them to argue that, had Mr. Roedel sent Stauffer the warning that Xomox published about cover-mounting in 1983 and again in 1986 this incident would not have happened.

As you may recall, when Xomox accepted Charles Lowe Company's tender of defense, it indicated that it would tender the defense back to Charles Lowe Company if it ever appeared that plaintiffs' claims against Charles Lowe Company are based on matters other than the design, manufacture or assembly of the valve in this case (a copy of the letter I sent outlining the conditions of Xomox's acceptance of Charles Lowe Company's defense is attached). In light of the argument plaintiffs' attorneys intend to make based on Mr. Roedel's testimony, those facts have now arisen.

As a practical matter, since the jury is likely to decide the case within the next week, Xomox can no longer insist that Charles Lowe Company resume its own defense. However, if the jury does return a verdict against Charles Lowe Company for reasons separate from the design, manufacture or assembly of the Xomox valve, Xomox will insist that Charles Lowe Company pay its full share of the verdict. Xomox will also insist that Charles Lowe Company handle its own post-trial proceedings and, if applicable, appeal.

We will let you know the result of the trial as soon as the jury completes its deliberations. In the meantime, if there is any additional information you need from us, please let me know. I can be reached through our Irvine office (714) 253-2700.

Very truly yours,

SNELL & WILMER

/s/ Luke A. Torres
LUKE A. TORRES

APPENDIX E

[Filed Jul. 1, 1994]

SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR THE
COUNTY OF CONTRA COSTA

Case No. C93-02699
(Consolidated with Case No. C93-02811)

[Case Assigned to Dept. 5]

VERDICT FORM RE RICHARD SORNBORGER

TRIAL DATE: June 6, 1994

RICHARD T. SORNBORGER and GLORIA SORNBORGER,
Plaintiffs,

v.

XOMOX CORPORATION; CONTINENTAL MANUFACTURING COMPANY, INC.; CHARLES LOWE COMPANY; and DOES 1 through 200, inclusive,

Defendants.

VERDICT—RICHARD SORNBORGER

We, the jury in the above entitled action, find the following Verdict on the questions submitted to us:

Question No. 1: Are the defendants liable to Richard Sornborger?

Answer "yes" or "no."

Xomox Corporation	Yes	No
Answer:	9	3

Charles Lowe Company

Answer: 9 3

If you answer "no," sign and return this form. If you answer "yes," then answer the next question.

Question No. 2: Without taking into consideration the reduction of damages due to the comparative fault of Richard Sornborger, Luis Torres, Sr., or Rhone Poulenc/ Stauffer Chemical Company, if any, what do you find to be the total amount of damages, including economic and non-economic damages, if any, suffered by Richard Sornborger?

Answer:	(a) Economic Damages	$1,049,884.00
	(b) Non-Economic Damages	$ 260,000.00
	TOTAL	$1,309,884.00

If you answered "no damage", sign and return this verdict.

If you have found a dollar amount in response to Question No. 2, then answer Question No. 3.

Question No. 3: Assuming that 100% represents the total causes of Richard Sornborger's injuries and damages, what percentage of this 100% is attributable to the comparative fault of Richard Sornborger and what percentage of this 100% is attributable to Luis Torres, the defendants and Rhone Poulenc/Stauffer?

Answer:	To Richard Sornborger	5%
	To Luis Torres, Sr.	5%
	To Xomox Corporation	5%
	To Charles Lowe Company	10%
	To Rhone Poulenc/Stauffer Chemical Company	75%
	TOTAL	100%

Dated: 7-1-94

/s/ G. A. Osborne
Foreperson

APPENDIX F

[Filed Jul. 1, 1994]

SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR THE
COUNTY OF CONTRA COSTA

Case No. C93-02699
(Consolidated with Case No. C93-02811)

[Case Assigned to Dept. 5]

VERDICT FORM RE TORRES PLAINTIFFS

TRIAL DATE: June 6, 1994

RICHARD T. SORNBORGER and GLORIA SORNBORGER,
Plaintiffs,

v.

XOMOX CORPORATION; CONTINENTAL MANUFACTURING COMPANY, INC.; CHARLES LOWE COMPANY; and DOES 1 through 200, inclusive,
Defendants.

VERDICT—MILDRED TORRES,
TANIA TORRES AND LUIS TORRES, JR.

We, the jury in the above entitled action, find the following Verdict on the questions submitted to us:

Question No. 1: Are the defendants liable to Miidred Torres, Tania Torres & Luis Torres Jr.?

Answer "yes" or "no."

Xomox Corporation	Yes	No
Answer:	9	3
Charles Lowe Company		
Answer:	9	3

If you answer "no," sign and return this form. If you answer "yes," then answer the next question.

Question No. 2: Without taking into consideration the reduction of damages due to the comparative fault of Luis Torres, Sr., Richard Sornberger or Rhone Poulenc/ Stauffer Chemical Company, if any, what do you find to be the total amount of damages, including economic and non-economic damages, if any, suffered by the Torres plaintiffs:

Answer:	(a) Economic Damages	$1,137,073.00
	(b) Non-Economic Damages	$ 919,248.00
	TOTAL	$2,056,321.00

If you answered "no damage", sign and return this verdict.

If you have found a dollar amount in response to Question No. 2, then answer Question No. 3.

Question No. 3: Assuming that 100% represents the total causes of the Torres plaintiffs' injuries and damages, what percentage of this 100% is attributable to the comparative fault of Luis Torres, Sr. and what percentage of this 100% is attributable to Richard Sornborger, the defendants and Rhone Poulenc/Stauffer?

Answer:	To Luis Torres, Sr.	5%
	To Richard Sornborger	5%
	To Xomox Corporation	5%
	To Charles Lowe Company	10%
	To Rhone Poulenc/Stauffer Chemical Company	75%
	TOTAL	100%

Dated: 7-1-94

/s/ G. A. Osborne
Foreperson

APPENDIX G

[Filed Oct. 18, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-95-0498 SI

CHARLES LOWE COMPANY, and
FEDERAL INSURANCE COMPANY,
Plaintiff,

v.

XOMOX CORPORATION, *et al.*
Defendants.

ORDER DENYING IN PART AND
GRANTING IN PART MOTIONS FOR
SUMMARY ADJUDICATION

On September 20, 1996, the Court heard argument on plaintiffs' and defendants' respective motions for summary adjudication of issues. Having considered the arguments of counsel and the papers submitted, the Court hereby DENIES plaintiff's motion, DENIES in part and GRANTS in part defendant's motions.

BACKGROUND

Plaintiffs and counterclaims defendants Charles Lowe Company ("LOWE") and Federal Insurance Company ("Federal") filed their Second Amended Complaint in this matter on August 6, 1996. Defendant and counter-claimant XOMOX Corporation filed its Third Amended

Counterclaim and its answer to the Second Amended Complaint on August 23, 1996.

Both plaintiffs and defendant now seek partial summary judgment on the issue of whether XOMOX committed a breach of contract in refusing to honor the indemnity agreement entered into by the parties on March 21, 1994 (the "Agreement"). Defendant also seeks summary adjudication of two of LOWE's other claims against XOMOX.

The primary point of contention between the parties is an indemnity agreement through which XOMOX conditionally agreed to provide LOWE's defense to the *Sornborger* and *Torres* personal injury and wrongful death claims (hereinafter, "the underlying action"), and indemnify LOWE for any loss resulting from that action. Plaintiffs' present motion is based on their assertion that all requirements and conditions set out by the Agreement were met and that XOMOX breached the Agreement by refusing to indemnity LOWE following LOWE's settlement with the plaintiffs in the underlying action. Defendant XOMOX's motions are based on its assertion that the condition creating XOMOX's duty to indemnify LOWE under the Agreement never occurred.[1]

LEGAL STANDARD

The Federal Rules of Civil Procedure provide for summary adjudication when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

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[1] A more complete description of the factual and procedural background in the underlying action is included in this Court's March 5, 1996 Order.

In a motion for summary judgment, "[i]f the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issues of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, '*specific facts* showing that there is a genuine issue for trial.'" *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)); *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103-04 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986).

A moving party who will not have the burden of proof at trial need only point to the insufficiency of the other side's evidence, thereby shifting to the nonmoving party the burden of raising genuine issues of fact by substantial evidence. *T.W. Electric*, 809 F.2d at 630 *citing Celotex*, 477 U.S. at 323; *Kaiser Cement*, 793 F.2d at 1103-04.

In judging evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence, and draws all inferences in the light most favorable to the nonmoving party. *T.W. Electric*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)); *Ting v. United States*, 927 F.2d 1504, 1509 (9th Cir. 1991).

The evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Falls Riverway Realty, Inc. v. Niagara Falls*, 754 F.2d 49 (2nd Cir. 1985); *Thornbill Pub. Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

Hearsay statements found in affidavits are inadmissible. *See, e.g., Fong v. American Airlines, Inc.*, 626 F.2d 759, 762-63 (9th Cir. 1980). The party who will have the burden of proof must persuade the Court that it will have sufficient admissible evidence to justify going to trial.

DISCUSSION

1. Breach of Contract.

Plaintiff LOWE contends that it has performed its obligations under the indemnity agreement, but that XOMOX has refused to indemnify LOWE for the $900,000 expended in settlement of the underlying action. Defendant XOMOX alleges that the verdict in the underlying action relieved XOMOX of any duty to indemnify LOWE and that therefore the Agreement was not breached.

In the indemnity agreement, XOMOX agreed to indemnify and assume the defense of LOWE against loss "arising out of the allegedly defective design, manufacture and assembly of the valve that forms the subject matter of plaintiffs' claims against [LOWE] conditioned upon the following terms . . ." The condition most relevant to the present case provides that the assumption of defense and indemnification will continue

> only so long as the facts continue to indicate that plaintiff's claims against Charles Lowe Company are based solely on the design, manufacture, or assembly by XOMOX [of the allegedly defective valve]. In the event that XOMOX becomes aware of *credible evidence suggesting that plaintiff's claims against* [*LOWE*] are based on matters other than the design, manufacture, or assembly by XOMOX of the [allegedly defective valve], XOMOX shall timely retender and withdraw from the defense and indemnification of Charles Lowe Company. (emphasis supplied)

See Cominos Decl., Exh. 5. The terms of the Agreement thus made the nature of the underlying plaintiff's claims against LOWE the touchstone of the indemnity obligation.

The day before closing arguments in the underlying action were scheduled to begin, defendant XOMOX notified LOWE that in the course of the trial plaintiffs had elicited evidence of negligence on the part of LOWE other than the design, manufacture or assembly of the valve, within the meaning of the Agreement. Recognizing that it was too late to re-tender the defense, XOMOX advised LOWE that "if the jury does return a verdict against [LOWE] for reasons separate from the design, manufacture or assembly of the XOMOX valve, XOMOX will insist that [LOWE] pay its full share of the verdict." *See* Englund Decl., Exh. D.

The jury's verdict assigned comparative fault percentages of five percent to XOMOX and ten percent to LOWE. XOMOX contends that this result relieved XOMOX of its duty to indemnify LOWE, and therefore refused to reimburse LOWE for the $900,000 expended by LOWE in settling the underlying action. LOWE contends that there is no basis to determine from the jury's verdict that LOWE's liability was based on anything other than its pass-through liability as a distributor of the XOMOX valve. Therefore, LOWE contends, XOMOX is required under the Agreement to indemnify LOWE for the $900,000.

According to LOWE, the indemnification agreement between the parties required that LOWE meet several obligations: (1) signing the agreement; (2) an affirmation that LOWE had no knowledge of facts or circumstances that would suggest that LOWE and XOMOX did not have a unity of interest in the defense of the under-

lying lawsuit, and that LOWE was aware of no credible evidence to support an independent liability claim; (3) LOWE's consent to the employment of Snell & Wilmer as defense counsel, and waiver of any conflict of interest that such representation might present even upon re-tender; (4) agreement to fully cooperate with XOMOX's investigation and defense of the lawsuit including making available any records and files, and providing witnesses for testimony; (5) an affirmation that no admission of guilt had been made by LOWE, and that no default judgment had been entered against LOWE; (6) agreement to direct LOWE's counsel to forward to Snell & Wilmer copies of files, reports, photos and other documents related to LOWE's defense in the case; and (7) dismissal without prejudice of LOWE's cross-complaint against XOMOX. LOWE asserts that it has performed each of the obligations required by the Agreement, and that XOMOX has breached the Agreement by refusing to indemnify LOWE.

XOMOX contends that the Agreement specified that indemnification was limited to "claims or loss based solely on the design, manufacture or assembly by XOMOX of the specific valve that forms the subject matter of plaintiff's claims." (*See* Cominos Decl. Exh. 5.) and that on these facts no duty to indemnify has arisen.

A. LOWE's Motion.

In a motion for summary adjudication in which the moving party will have the burden of proof at trial, "his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." William W. Schwarzer, *Summary Judgments Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 487-488 (1984). In the present case, plaintiff LOWE will have the burden at

trial to show that there was a breach of the indemnification agreement. This burden can only be met if LOWE can show that the damages awarded by the jury against LOWE were based solely on the underlying plaintiff's claims arising out of the allegedly defective design, manufacture or assembly of the XOMOX valve, and not on any matters other than this design, manufacture or assembly.

It appears to this Court that since the jury assigned to LOWE a percentage of fault twice that assigned to XOMOX, the jury's assessment of LOWE's liability was clearly based on something other than simply pass through liability as a distributor of XOMOX products. Thus, it cannot be said on these facts that the only possible outcome at trial on this issue would be in favor of plaintiff. The motion for summary adjudication of this issue must be DENIED.

B. XOMOX's Motion.

XOMOX seeks a ruling that, as a matter of law, there was no breach of the Agreement. At trial, XOMOX would not have the burden of proof at trial on this issue, and is thus only required to point to the insufficiency of plaintiff's evidence. Defendant has met this burden by demonstrating the lack of evidence available to show that LOWE's liability in the underlying action was based solely on the design, manufacture and assembly of the allegedly defective valve, and not on any matters other than this design, manufacture or assembly. Having met this burden, responsibility now falls on LOWE to raise genuine issues of material fact for trial, which LOWE has not done. Therefore plaintiff cannot meet the burden necessary to defeat defendant's motion. Defendant's motion for summary adjudication on the issue of contract breach is therefore GRANTED.

2. Defendant's Motions For Partial Summary Judgment.

Defendant XOMOX is seeking partial summary judgment on two other claims plaintiff LOWE has alleged in this action. The first relates to the "nature and extent" of LOWE's negligence in connection with the underlying accident, and the second relates to the claim that XOMOX is obligated to indemnify LOWE based on general indemnification principles separate from the agreement made between the parties.

A. Nature of LOWE's Liability.

Defendant seeks summary adjudication of LOWE's claim that its own liability in the underlying accident was based on its "passive fault and secondary actions in its status as a distributor/supplier of . . . [XOMOX products]." XOMOX contends that this issue was fully litigated in the underlying action and that the doctrine of collateral estoppel bars LOWE from re-litigating the issue in the present case.

Under California law, "the doctrine of collateral estoppel can be simply stated: any issue necessarily decided in the litigation of a cause of action that has been finally determined by a court of competent jurisdiction is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action." *First N.B.S. Corp. v. Gabrielsen*, 179 Cal. App.3d 1189, 1194 (1986) (citations omitted).

XOMOX contends that (1) the issue of the nature and extent of LOWE's negligence is identical to an issue previously litigated; (2) that there was final judgment on the merits in the underlying action; and (3) that LOWE was a party to the prior action, and its insurer Federal was in privity with LOWE. XOMOX argues that under these

circumstances the collateral estoppel doctrine must be applied.

LOWE argues that because LOWE and XOMOX were co-defendants in the previous action, the collateral estoppel doctrine does not apply, and the nature of LOWE's liabliity can be litigated in the present case. In the alternative, plaintiff contends that the issue of the comparative fault of the parties was not fully litigated in the underlying action.[2]

Under California law "it is fundamental as to the doctrine of res judicata that, before the former adjudication may operate as an estoppel as to issues in the later action, there must be an identity of parties . . . ." *Standard Oil Co. v. John P. Mills Org.*, 3 Cal.2d 128, 139 (1935). The parties are considered to be the same for purposes of collateral estoppel "when those between whom the evidence is offered *were on opposite sides in the former case*, and a judgment or other determination could in that case have been made between them . . . ." Cal. Code of Civ. Proc. § 1910 (emphasis added). The rule regarding the inapplicability of collateral estoppel to former co-defendants is well established in California. *See Victor Oil Co. v. Drum*, 184 Cal. 226 (1920); *City of San Diego v. California Water & Tel. Co.*, 71 Cal.App.2d 261, 276 (1945).

In the present case, it is undisputed that XOMOX and LOWE were co-defendants in the previous action, and that there was no cross-complaint in existence during the

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[2] LOWE argues that because of the shared defense strategy, no attempt was made to prove or argue separate liability as between LOWE and XOMOX, who were represented by the same lawyers. LOWE also argues that when damaging information related to LOWE came to light during trial testimony, no effort was made by defense counsel to counter the testimony through rehabilitation of witnesses, cross-examination, etc.

previous action. Therefore, under California law, issues adjudicated in the previous action are not res judicata in the present action.

Defendant also argues that plaintiff's agreement to a shared defense, as well as its agreement to dismiss any cross-complaint against XOMOX, should act as a waiver of the co-defendant exception to collateral estoppel in this case. Defendant offers no authority—and the Court can find none—which supports this argument. Defendant also makes policy arguments relating to judicial economy, inconsistent judgments and a plaintiff's right to a fair adversary proceeding; however, the Court is more persuaded by plaintiff's arguments that it would be unfair to apply collateral estoppel doctrine under the circumstances of this case.

It is therefore the opinion of this court that collateral estoppel does not govern the question of the nature and extent of plaintiff's negligence in the underlying accident. Defendant's motion for summary adjudication on this issue is DENIED.

B. Indemnity Obligation.

XOMOX also seeks summary judgment on LOWE's claim that XOMOX is obligated to indemnitfy LOWE for money paid in settlement of the underlying action on grounds separate from the indemnification agreement entered into by the parties. LOWE contends that XOMOX's obligation to indemnify LOWE is based on general indemnification principles, and the facts and circumstances of the case. XOMOX contends that its duty to indemnify under general indemnification principles is based on the nature and extent of LOWE's liability in the underlying action and, as argued above, plaintiff is barred from relitigating that issue. Since the Court has found collateral

estoppel to be inapplicable under the circumstances of this case, the issue of the nature and extent of plaintiff's liability for the underlying accident presents a genuine issue of material fact for trial. Defendant's motion for summary adjudication on this issue is therefore DENIED.

CONCLUSION

Plaintiff's motion for summary adjudication is DENIED. Defendant's motions for summary adjudication are DENIED in part and GRANTED in part.

IT IS SO ORDERED.

Dated: October 17, 1996.

/s/ Susan Illiston
SUSAN ILLISTON
United States District Judge

[Filed Aug. 6, 1996]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-95-0498 SI

CHARLES LOWE COMPANY,
FEDERAL INSURANCE COMPANY,
Plaintiffs,

vs.

XOMOX CORPORATION, EMERSON ELECTRIC COMPANY, INC., and DOES I through XX,
Defendants.

SECOND AMENDED COMPLAINT FOR BREACH OF CONTRACT, INDEMNIFICATION, DECLARATORY RELIEF AND INTERFERENCE WITH CONTRACTUAL RELATIONS

* * * *

FIRST CAUSE OF ACTION

(Breach of Contract as to XOMOX)

21. Plaintiffs reallege paragraphs 1 through 20, inclusive, and incorporate them fully by this reference herein.

22. LOWE has duly fulfilled, performed and satisfied any and all conditions, requirements or obligations imposed upon it by virtue of the indemnity agreement referred to in paragraph 12, above, save for those conditions, requirements or obligations which have been excused.

23. XOMOX has breached the indemnity agreement referred to in paragraph 12 above, *inter alia*, by virtue of the following:

a. By failing to defend and indemnify LOWE in the *Sornborger* and *Torres* actions;

b. By not timely retendering or withdrawing from the defense or indemnification of LOWE in the *Sornborger* and *Torres* actions;

c. By not reimbursing LOWE for the settlement payment made to plaintiffs in the *Sornborger* and *Torres* actions.

24. By virtue of the foregoing, LOWE and FEDERAL have been damaged in the amount of $900,000 plus interest from August 1994 in addition to costs and attorneys' fees in an undetermined amount. LOWE has been further damaged in that LOWE has only $100,000 of its policy limits remaining on its FEDERAL policy on account of the settlement yet faces exposure substantially in excess of this sum by virtue of pending litigation involving the June 22, 1992 incident referred to herein.